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**COPYRIGHTS IN CYBERSPACE  
AND  
DIGITAL RIGHTS MANAGEMENT**  
(an update for 2002)

2002 saw a number of significant developments in efforts to balance the rights of owners, distributors and consumers of digital works of authorship. In March, the World Intellectual Property Organization's Copyright Treaty became effective, having been ratified by the minimum required thirty countries. In the United States, one of the first countries to enact conforming legislation, there were several challenges to the constitutionality and the particular application of the Digital Millennium Copyright Act; and also several notable cases testing the legality of facilitating open access to proprietary music and film by means of the Internet.

Many countries, including most of the European countries, have not yet ratified the WIPO Copyright Treaty nor enacted conforming legislation. But increasingly in 2002, new legislation and case decisions show a trend toward giving digital works and works made available online the full scope of copyright protection available to more traditional works; and also a trend toward harmonizing the scope of protection afforded nationally with international standards.

This year there were also important tests of the continued viability of the "fair use" doctrine in the United States and of analogous exceptions and limitations on the exclusive rights of copyright owners abroad.

This outline presents some of the most important legislative, regulatory and judicial developments in cyberspace-related copyright law during the past twelve months. It is not intended to be exhaustive. But it is intended to give the reader an indication of the trends and issues that have become apparent nationally and internationally during this year.

## **I. Case law**

### **A. Domestic Copyright Law in Cyberspace**

1. *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 2002 U.S. App. LEXIS 10963 (5th Cir. 2002). Website operator's copying of the building code law from a municipality's publication did not constitute copyright infringement.
2. *A&M Records, Inc. v. Napster, Inc.*, 2002 U.S. App. 4752 (9th Cir. 2002). There was no abuse of discretion when the district court modified its preliminary injunction to require Napster's web site to remain shut down until it installed a new filtering system.
3. *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 2002 U.S. Dist. LEXIS 7333 (C.D. Cal. 2002). The district court likened this case to Napster (but using visual images rather than music files) and issued a preliminary injunction against Cybernet. The injunction prohibits Cybernet from allowing Perfect 10 content or using "complaining" celebrities on Adult Check websites. The injunction also requires Cybernet to affirmatively monitor its site. Defendant Cybernet provides an age verification service, "Adult Check", to screen out minors from visiting adult content websites. For a monthly fee, a member of Adult Check receives access to all sites using Adult Check age verification. Cybernet provides a search engine and links to various websites, including a link to Perfect 10. The district court found that there was a strong likelihood that Adult Check has engaged in conduct that infringed Perfect 10's copyrights. The case provides a substantial question whether or not Cybernet is a provider of online services under the Digital Millennium Copyright Act. Nevertheless, no safe harbor was likely to apply.
4. *United States v. Elcom Ltd.*, 2002 U.S. Dist. LEXIS 9161 (N.D. Cal. 2002). Federal district court for Northern California ruled on May 8, 2002 that DMCA's ban on copyright circumvention tools is constitutional even if the tools are used for legal purposes. Therefore, Elcomsoft, a marketer for eBook formatter software, will face criminal charges. Judge Whyte ruled that the government's purpose was not to

control the content of the software, but rather its function. Dmitri Sklyarov was the first person to be indicted under the DMCA. Jennifer Lee, Man Denies Digital Piracy in First Case Under '98 Act, N.Y. Times, Aug. 31, 2001, at C3.

5. *In re Napster, Inc. Copyright Litigation*, \_\_ (Feb. 21, 2002). The court found that Napster was entitled to a Rule 56(f) stay to pursue discovery on the issue of misuse. There were also serious questions as to whether the plaintiffs had actual ownership of the works in question.
6. *Kelly v. Arriba Soft Corp.*, 2002 U.S. App. LEXIS 1786 (9th Cir. 2002). Thumbnail images displayed by an Internet search engine constitute a prima facie case of copyright infringement, but the fair use exception applied. Arriba's search engine "crawled" through the Web to find images and download full-size copies onto Arriba's server. A computer program then generated thumbnail images with lower resolution, then deleted the full-size originals. Kelly sued for copyright infringement because photographs were copied from his website or other websites with whom he has a license. The Ninth Circuit found that although the search engine was operated for commercial purposes, the use of the thumbnail was more incidental than exploitive. Additionally, the thumbnails served an entirely different function than the original images, the use was "highly transformative," published works are entitled to less protection, the thumbnail did not hurt Kelly's market but rather guided the user to Kelly's website. If a user clicked on the thumbnail image, however, then he would find the "Images Attributes" page with a full-size image (through a process called inline linking) and links to a the originating website, the Arriba banner, and Arriba advertising. The court determined that the fair use factors in the case of Arriba's inline linking and framing all weighed in favor of Kelly. Therefore, the thumbnail images were protected by the fair use exception, but the full-size image constituted copyright infringement.
7. *Rodgers & Hammerstein Org. v. UMG Recordings, Inc.*, 2001 U.S. Dist. LEXIS 16111 (S.D.N.Y. 2001). Southern District of New York found that Famclub's (a subsidiary of UMG Recordings) operation of an Internet music service "streaming" sound recordings to consumers on demand constituted copyright infringement. Farmclub did hold a license to each of the songs, but the license was limited to express configurations and record numbers, not to the use of songs with an online music service.
8. *Robert Hendrickson v. Ebay, Inc.*, 165 F. Supp. 2d 1082 (C.D. Cal. 2001). The court granted eBay summary judgment that it did not infringe plaintiff's copyright. eBay is an ISP within the meaning of the DMCA and is protected by the DMCA's safe harbor provision. Because the plaintiff failed to provide eBay with notification of six particular elements, the safe harbor determination was limited to whether eBay satisfied the first two prongs. First, eBay did not have actual knowledge of the allegedly infringing activity prior to the lawsuit. Second, eBay did not have the right

or ability to control the allegedly infringing activity, so it was not necessary to determine whether or not eBay benefited financially.

9. *Video Pipeline, Inc. v. Buena Vista Home Entm't Inc.*, 192 F. Supp. 2d 321 (D.N.J. 2002). District court issued an injunction prohibiting website middleman from creating his own movie trailers to be used by the website client video retailers. This action violated rights of the copyright owner as well as the exclusive distributor.
10. *Ellison v. Robertson*, 189 F. Supp. 2d 1051 (C.D. Cal. 2002). Summary judgment was appropriately granted to the ISP when an author's works were copied and uploaded onto a USENET newsgroup. There was no direct infringement because the copies were made and stored on USENET servers. There was no vicarious infringement because the ISP qualified for the safe harbor provision of the DMCA and did not derive any financial benefit from the accused activity.
11. *Getaped.com, Inc. v. Cangemi*, 2002 U.S. Dist. LEXIS 4622 (S.D.N.Y. 2002). Because the website's material and underlying source code became accessible on the Internet, the copyrighted website was properly considered a publication. Statutory damages and attorneys fees should be awarded.
12. *Marobie-Fl v. Nat'l Ass'n of Fire Equip. Distribs.*, 2002 U.S. Dist. LEXIS 2350 (N.D. Ill. 2002). A finding of no damages was supported by the evidence because the infringer never charged a fee to download copyrighted clip art. Additionally, there was evidence that the infringer was told that the art was in the public domain.
13. *Liberty Am. Ins. Group v. Westpoint Underwriters, L.L.C.*, 199 F. Supp. 2d 1271 (M.D. Fl. 2001). Despite plaintiffs' ownership of a valid copyright, copyright infringement was precluded by plaintiffs' failure to show that its software source code was protectable after filtering out nonprotectable material.
14. *Random House, Inc. v. Rosetta Books L.L.C.*, 283 F.3d 490 (2d Cir. 2002). Court denied publisher's motion for a preliminary injunction. It was necessary to make a factual determination whether an "ebook" was simply a form of a book and therefore within the license.
15. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001). Defendant 2600 Enterprises maintained a website geared towards hackers. On the site, it posted a copy of the decryption program which was designed to circumvent the encryption technology used on DVDs to prevent unauthorized viewing and copying. The court rejected Defendant's argument that the injunction violated the First Amendment. The program contained both a speech and a non-speech (functional) aspect, and the injunction targeted only the non-speech aspect. [2600 recently announced that it would not ask the Supreme Court to overturn the ruling which banned the publication. The Electronic Frontier Foundation said that it would find another case through which

to challenge the DMCA. Bloomberg News, Web Site for Hackers Will Not Appeal, N.Y. Times, July 6, 2002, at C2.]

16. *Eldred v. Ashcroft*, 255 F.3d 849 (D.D.C. 2001). Regardless of whether the preamble limits the power of Congress, the Copyright Term Extension Act of 1998 still passed muster. The Supreme Court has granted cert on this case; it will be argued in October 2002. [Supporters of the CTEA said that it was designed to harmonize U.S. law with that of Europe and Japan. Sabra Chartrand, To some, globalization, not corporate lobbying, is the real reason copyrights are growing in power, N.Y. Times, Feb. 25, 2002, at C6.]
17. *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001). A California federal court granted Yahoo! Declaratory judgment that a French court order requiring Yahoo! To prevent the sale of Nazi-related items on its auction service was unenforceable in the United States as inconsistent with the First Amendment.
18. *Bonneville Int'l Corp. v. Peters*, 153 F. Supp. 2d 763 (E.D. Pa. 2001). The Copyright Office had sufficient statutory authority to determine that AM/FM broadcast signals transmitted simultaneously over a digital communications network, like the Internet, was not exempted by 17 U.S.C.S. § 114(d)(1)(A).
19. *CoStar Group Inc. v. LoopNet, Inc.*, 164 F. Supp. 2d 688 (D. Md. 2001). Online real estate listings service qualified as an ISP for § 512 immunity under DMCA.
20. The Church of Scientology sued the search engine Google for copyright infringement. The church complains that a search for "Scientology" includes links to a website criticizing the church, but including copyrighted church materials. The website in question, "Operation Clambake", is based in Norway, and therefore beyond the reach of the United States copyright law. Google at first removed the link to Operation Clambake, but has since adopted a new company policy. Now, whenever Google receives a complaint that causes it to remove links from its index, Google will provide a link to the complaint at Chilling Effects Clearinghouse (a joint project with the Electronic Frontier Foundation and several law schools). Site owners can restore their link by agreeing to accept responsibility for the contents of their pages. In this case, Operation Clambake declined to submit itself to United States law. David F. Gallagher, A copyright dispute with the Church of Scientology is forcing Google to do some creative linking, N.Y. Times, April 22, 2002, at C4.
21. Electronic Frontier Foundation filed a complaint against major Hollywood studios and TV networks on June 6, 2002. The complaint asks a federal judge "to declare that consumers can use digital recorders to watch shows after they are broadcast, skip all commercials, transmit recordings to members of their households and send copies of free TV broadcasts to anyone on the Internet as long as they are not compensated."

Jon Healey, Liberties Group Sues Over Consumers' Use of Digital Devices, L.A. Times, June 7, 2002, at Part 3, 2. [This is a reaction to the suit against SonicBlue. U.S. Magistrate Judge Charles Eick in L.A. has ordered SonicBlue to detail what shows users watch, when they watch, and whether they skip commercials. The users themselves would not be identified. Christopher Stern, Privacy Fights Centers on Ad-Zaper; ReplayTV Case Tests Viewers' Right to Alter Copied Programs, Washington Post, May 4, 2002, at A01.

## **B. International Case Law**

1. *Hit-Bit Software GmbH v. AOL Bertlesmann Online GmbH & Co., KG*, (March 8, 2001). A German court held an Internet service provider (ISP) liable for copyright infringement for material that appeared without the ISP's knowledge or permission on a website that it hosted. The host site allowed users to upload and download copyrighted music files. The forum allowed German subscribers access to "Midi-files", digital, synthesized versions of musical works reworked by the musician. AOL had attempted to find whether the three particular Midi-files in question were copyright protected, but were unable to find any copyright notices in the customary location. Therefore, AOL had no knowledge that its subscribers were infringing until Hit-Bit brought it to their attention; AOL removed the works expeditiously. The German court determined that this case was governed by the German copyright law, the Urheberrechtsgesetzes (UrhG), which has a negligence-based, pro-plaintiff standard, rather than the more recent German telecommunications law, the Teledienstegesetz (TDG) which holds the ISP liable only if it has actual knowledge of the content and can prevent users from gaining access to the materials. This departed from the lower court's decision. German ISPs cannot rely on a no-knowledge defense, but must prove that their actions leading up to the infringing act did not constitute negligence.
2. *Newsbooster.com* (July 5, 2002) A Danish court ordered an Internet news service to stop linking to websites of Danish newspapers. Newsbooster.com had connected its users to specific pages on the Internet, rather than to a site's home page.
3. A Tokyo district court in April 2002 ruled against a Napster-like service, Japan MMO which had operated a free music exchange service called File Rogue. A Dutch court found that users, not the music service (Kazaa Media Desktop), were liable for violating copyright laws. Matt Richtel, Music Services Aren't Napster, but the Industry Still Cries Foul, N.Y. Times, April 17, 2002, at C1.
4. A Dutch court ruled that Film88.com, offering users an online movie theater of hit films for \$1, should be shut down. Film88.com did not receive permission from the studios, nor did it pay them. Film88.com was operated out of Iran, which does not recognize foreign copyrights, but had its film library and servers located in Holland. Authorities in Dutch anti-piracy foundation, BREIN, acted in response to a request by

the Motion Picture Association. Jon Healey, Online Movie Site Closed Down, L.A. Times, June 7, 2002, at Part 3, 2.

5. On January 31, 2002, two members of the warez group DrinkorDie pleaded guilty in a federal court to criminal charges of copyright infringement. The group had boasted of its activities, pirating the latest computer software and DVDs and making it freely available on the Internet. The U.S. Customs Service continues to investigate the group's members. David Rosenzweig, 2 Men Tied to Internet Piracy Gang Plead Guilty, L.A. Times, Feb. 1, 2002, at Part 2, 3.

## **II. Legislation/Regulation**

### **A. Domestic**

The Senate is currently considering a bill sponsored by Sen. Ernest Hollings (D-SC) titled "Consumer Broadband and Digital Television Promotion Act." Hollings chairs the Senate Commerce Committee. The legislation would require the computer industry to develop security standards to protect the transmission and duplication of digital content. Manufacturers and content owners would have one year to agree on the technology to enforce the copyright; after that, the Federal Communications Commission would impose a standard. Any device not implementing the standard would be illegal. Mike Musgrove, Hollings proposes Copyright Defense; Bill Would Require Electronic Products to Deter Piracy, Washington Post, Mar. 22, 2002, at E03. [Currently, the only fair use spelled out in the bill is recording a TV program. Rob Pegoraro, As Copyright Gets a Starring Role, We're Cast as the Villains, Washington Post, Mar. 31, 2002, at H06.]

The House is considering a bill sponsored by Rep. Lamar Seeligson Smith (R-TX) titled "Intellectual Property Protection Act of 2002." The bill is designed to "prevent and punish counterfeiting and copyright piracy, and for other purposes." The bill seems especially designed to protect the interests of the U.S. entertainment software and business software industries. Congressional findings also include the revenue lost by the motion picture, music, and publishing industries due to piracy.

Library of Congress Librarian James Billington is charged by Congress with administering copyright laws for the printed word and sound recordings. On June 20, 2002 he adjusted the royalty fees that webcasters must pay musicians and record companies. Billington announced that websites broadcasting music over the Internet must now pay a \$0.07 per song, per listener. This is half the rate suggested by the Copyright Arbitration Royalty Panel; nevertheless, many Internet radio stations fear that they will be unable to afford the new rates. The rates are required by the Digital Millennium Copyright Act. Billington's decision can be appealed to the U.S. Court of Appeals for the District of Columbia. Christopher Stern, Curtain Calls for Webcasts?

Some Decry Order to Pay Royalties to Musicians, Washington Post, June 21, 2002, at E01.

## **B. International**

### **1. WIPO**

On March 6, 2002 the World Intellectual Property Organization Copyright Treaty ("WCT") came into force. Its sister treaty, the WIPO Performances and Phonograms Treaty ("WPPT"), came into force on May 20, 2002. Both "Internet treaties" seek to safeguard the interests of creators in cyberspace. Thirty countries are currently parties to the treaties.

### **2. European Community**

In February 2002, the European Parliament passed a new media copyright law. Members of the music industry backed the measure as protecting against Internet piracy. David Altaner, EU Court Backs Levi in Jeans Case, L.A. Times, Nov. 22, 2001, at Part 3, 2.

In May 2001, the European Union adopted the European Parliament and Council Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society. The so-called "Information Society Directive" is supposed to provide guidelines for member countries as they draft national legislation to implement the WCT and the WPPT. The Directive requires its 15 member states to enact implementing legislation by December 2002. The Directive includes a "detailed and exhaustive list of exceptions to the reproductions right and the right of public communication." There is a mandatory exception for reproduction of technical copies, activity that is transient in nature with the sole purpose of enabling transmission to a third party network or to facilitate the lawful use of the copyrighted work (with no significant economic impact on the copyright owner). The EU Directive also includes exceptions for publicly accessible libraries, educational establishments, museums, archives, broadcasting organizations, and noncommercial social organizations. Not all EU member states require a levy on blank recording media to compensate composers and authors whose work may have been copied without authorization. Peter K. Yu, "An Overview of the EU Information Society Directive," available at <http://www.GigaLaw.com>.

"The EU Digital Copyright Directive empowers member states to take action to ensure access to copyright-protected works for limited 'public good'-type purposes, regardless of technological or contractual restrictions on their use. However, the language of the Directive enabling this is vague and difficult to construe. Much will depend on its implementation." Simon Strokes, The Future of Digital Copyright: A View from Europe, 7 Cyberspace Lawyer 17 (April 2002).



Accession of E.C. to WCT and WPPT was Council decision 2000/278 [2000] O.J. L89/6. It was adopted by Council on April 16, 2000.

Thomas C. Vinje, in *Should We Begin Digging Copyright's Grave?*, 22 E.I.P.R. 551 (Dec. 2000), criticizes the Directive, noting that it fails to achieve harmonization, defines exceptions too narrowly, does not leave flexibility for copyright law to adapt to future innovations, encourages the spread of levies, and threatens to replace copyright law with technological monopolies. 551.

Michael Doherty and Ivor Griffiths provide a good overview of the Directive in The Harmonisation of European Union Copyright Law for the Digital Age, 22 E.I.P.R. 17 (Jan. 2000).

### **3. Asia**

On October 27, 2001 China promulgated the amendment to its PRC, Copyright Law of 1990. This came just one week before China signed its WTO accession documents. The amendment makes efforts to provide practical measures against infringements using IT. Software is redefined as one type of ordinary copyrighted works so that it is entitled to the same full protection as other ordinary copyrighted works. Copyright protection can now cover Internet activities and products disseminated on the Internet. Vincent Wang & Ron Cai, China Developments: New Changes to Copyright Protection in China, 6 Cyberspace Lawyer 19 (January 2002).